Media law in New Zealand

INSIGHTS FOR 2019

CHAPMAN TRIPP

Contents

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Media law encompasses all legal issues affecting social media, entertainment, advertising, broadcasting, digital and analogue media. The changing scope of this sector means that laws and regulations which have a bearing on the media, such as defamation law, privacy law and competition law are constantly being tested.

Trends which we expect will unfold in 2019 are:

- the testing of the new public interest defence for defamation and increased difficulty in dismissing minor defamation claims
- a more restrained approach to defamation damages awards, with authoritative guidance expected later this year in the Supreme Court's decision in *Craig v Williams*
- a strengthening of the Privacy Bill in response to international and technology developments, and
- continuing churn in the media industry, within the regulatory constraints imposed by a belief that media plurality must be protected.

Defamation

Bar raised for publishers

In media law, an allegation of defamation focuses on the publication of a false and unjustified attack on a person's reputation.

Last year the Court of Appeal created the public interest defence to defamation.[1] That defence applies to any publication where the publisher can show that:

- there was a public interest in the subject matter being published, and
- the communication of the information was responsible.

Matters of public interest are matters that invite public attention, have generated considerable public controversy or notoriety, or are of substantial concern to at least a segment of the public.

Factors the Court will consider when assessing whether information was communicated responsibly include:

- the seriousness of the allegation
- the level of public importance
- the urgency of the matter
- the reliability of any source
- whether the subject was given an opportunity to respond and that response was accurately reported
- the tone of the publication, and
- whether it contained unnecessary statements irrelevant to the public interest.

As these factors are elaborated on and strengthened, we will see this defence become more embedded this year.

KEY TAKE-OUTS

Publishers should document the steps taken when publishing stories which may carry a defamation risk. We suggest as best practice keeping a record of evidence and correspondence, or developing a checklist of appropriate procedural steps when procuring and developing a potentially defamatory story. This is currently not a legal requirement.

The public interest defence may have raised the threshold for publishers. Under the new public interest defence the onus reverses the *Lange* qualified privilege defence. Now the defendant must prove that the communication was responsible. It is no longer the plaintiff's role to prove that the publisher had acted so irresponsibly that the qualified privilege protection should be lost.

Because the public interest defence is about *responsible communication* rather than responsible journalism, it is not limited to the media.

The defence applies retrospectively to cases where the publisher had relied on the *Lange* defence. Publishers will need to evaluate how this change affects their position.

[1] Source: *Durie v Gardiner*.

The public interest defence in action

The first time the High Court applied the public interest defence was last year in *Craig v Slater*.

In this case the Court found that Cameron Slater of WhaleOil could rely on this defence even though he failed to seek comment from Mr Craig and had not made any significant attempt to independently verify the allegations.

In reaching this conclusion, the Court found that, even though he was a blogger, Mr Slater should be held to the same standard as mainstream media.

This decision is currently being appealed to the Court of Appeal to seek clarification on whether Mr Slater acted responsibly in his communication.[2] The Court of Appeal decision will provide a useful clarification of where the boundaries are to be drawn.

International experience indicates that it will take several cases before there is greater clarity around the standard of responsibility the Courts will require for a defendant to be protected by the public interest defence.

Disposing of claims based on harm

The trend in the UK over recent years – both in terms of legislative reform and case law – has been to raise the threshold where a defamation finding is available.

While New Zealand defamation law has been substantially unchanged since 1992, our Courts in 2017 imported a UK judgment from 2005. That decision found that "if a publisher can show the statement has caused less than minor harm to the plaintiff's reputation, that defence will defeat a claim of defamation".

The acceptance of this principle in New Zealand in 2017 seemed to open the door to a more flexible dismissal regime. This allowed defendants to avoid the expense of a defamation trial where the publication of the alleged defamation was to a small audience and the harm created was minimal.

But two decisions in 2018 suggest that door may be closing:

- In *Sellman v Slater*, the Court declined to dismiss the proceedings, saying there was no evidence that the statements had not been read or that the defamation claim as a whole "did not advance the legitimate purpose of protecting or vindicating the plaintiffs' reputations".
- In *Craig v Stiekema*, which concerned an allegation made on Facebook, the Court declined the strike out application because it was impossible to establish how many people had read the statement and therefore that the reputational impact had been minimal

KEY TAKE OUTS

We expect that in 2019 strike out applications for defamation will only succeed where publication was extremely limited and the allegedly defamatory meanings were not serious.

However it is worth noting that most publications on social media do not allow the publisher to establish the number of viewers who skim a headline or any other content without clicking on the story. As a consequence, social media publishers should not rely on a minimum threshold of harm to defeat a defamation claim.

[2] Source: Chapman Tripp and Julian Miles QC are representing Mr Craig in his appeal.

Defamation damages

In two significant cases last year, the Courts took the view that a finding of defamation is the main remedy to vindicate a plaintiff's reputation, rather than financial compensation.

In *Williams v Craig*, the Court of Appeal set aside a jury damages award of $1.27m finding that the jury's verdict that Mr Craig defamed Jordan Williams was the main way to restore Williams' reputation and that general damages in defamation cases are solely compensatory.

The High Court followed this approach in *Craig v Slater*. It found that Mr Slater had defamed Mr Craig but considered that this finding was a sufficient remedy and declined to award damages.

Seminar on these developments

Justin Graham, a partner at Chapman Tripp, and Tom Cleary, senior solicitor, will be presenting a seminar this year for the Auckland District Law Society on these and other developments in defamation law and on strategies for managing defamation proceedings.

If you want to be notified closer to the time, please contact us.

KEY TAKE OUTS

It is too early to tell whether these judgments mean that New Zealand Courts are falling in line with their English and Australian counterparts by placing greater restrictions over damages awards.

Whether this trend will continue in 2019 depends on the outcome from the Supreme Court in *Craig v Williams*. This decision is expected in the first half of this year.[1]

[1] Source: Chapman Tripp and Stephen Mills QC acted on this appeal.

Privacy

The current Privacy Act is 25 years old. When it was passed, the internet was in its infancy and no one could have envisaged the social media ecosystem we have today.

The new Privacy Act should be enacted this year, providing a long overdue refresh of New Zealand privacy law. The quickening pace at which personal data is used within the media industry requires comprehensive privacy laws to ensure that data is protected.

The Privacy Bill has been nine years in the making. It is based on a 2011 review undertaken by the Law Commission, which was drawn up as legislation in 2013 but never introduced. In the intervening years, other countries – including Australia – have sharpened their privacy regimes, including substantially increasing the available penalties. The maximum penalty provided for in the Bill is a fine of $10,000.

The Bill is already out of step with international norms but Justice Minister Andrew Little decided that the more efficient process was to introduce the Bill as it was and rely on the Select Committee to lick it into shape.

Changes to the existing Act include:

- new mechanisms to promote early intervention and risk management by agencies, rather than relying on individuals to make complaints after a breach has occurred
- a new requirement to report breaches to the Privacy Commissioner and, where there is a risk of harm to individuals, to notify those people (except where this would prejudice national security or the maintenance of law or could endanger someone's safety), and
- new enforcement powers for the Privacy Commissioner.

The Privacy Commissioner's submission on the Bill will be significant to the Select Committee's deliberations. He is proposing a large number of amendments and improvements.

In particular, he wants the right to be forgotten and the right to personal information portability to be inserted into the Bill. This would bring New Zealand into line with the European Union (*EU*) and would allow people to demand:

- the erasure of personal information that is out-of-date, inaccurate or misleading, and
- the transfer of their information from one online service to another.

The Select Committee is due to release its report on the Privacy Bill later this month.

KEY TAKE OUTS

Privacy and Data Protection

We are interested to see how the Select Committee will deal with the convergence between privacy and data protection.

They had largely been treated as separate fields until the Cambridge Analytica scandal reduced the distinction to rubble by using data to predict personal characteristics and preferences in the political sphere.

Because the data pool is expanding exponentially and AI and machine learning allow inferences to be drawn instantly from that data, the issue of how to control access to personal data by third parties will become more pressing.

Latest update:

The Bill is due back in the House the week of 11 March. We'll follow up on the matter.

Privacy *(continued)*

Complying with GDPR

The European Union's General Data Protection Regulation (*GDPR*), which came into force last year, has direct implications for New Zealand businesses which:

- process data and have an office in the EU, regardless of whether the data processing takes place in the EU (this includes providers of outsourced services such as IT or cloud storage), or
- process data, regardless of location, relating to the sale of goods and services to EU citizens, for example online retailers.

Businesses which are subject to the GDPR need to be aware of the GDPR principles and should always get clear and unambiguous consent from data subjects before processing personal data.

Personal data is very broadly defined in the GDPR and covers information collected voluntarily from the individual or accessed through cookies, web analytics, and sensors.

The minimum fine for failure to comply is €10m. The French data privacy regulator recently fined Google €50m (NZ$85m) for making it too difficult for users to find essential information about how their data would be used and processed, and for failing to obtain specific and unambiguous consent by not asking users to specifically opt in to ad targeting.

> **"Privacy is now best described as the ability to control data we cannot stop generating, giving rise to inferences we cannot predict."**
>
> **Andrew Burt**
> **Harvard Business Review**

KEY TAKE OUT

While there is likely to be a grace period for New Zealand companies which act in good faith with EU regulators, that won't last indefinitely and will probably expire sooner rather than later.

Invasion of privacy and damages

New Zealand plaintiffs are likely to try adding a breach of privacy claim to damages following a UK case involving Sir Cliff Richard.

Sir Cliff Richard's victory over the BBC when he sued them for their coverage of historical child abuse claims, which included helicopter footage of a police raid on Sir Richard's house, has been accepted into law despite academic criticism.

The Court in this case held that there should be a reasonable expectation of privacy in a police investigation because the fact of being investigated can cause stigma, even in the face of the presumption of innocence. This does not disturb the right of the Police to disclose information for reasons of public safety or to 'shake the tree' to find out if there are any more accusations out there.

The Police had not given the information to the BBC voluntarily so the Court's finding was that the BBC invaded Sir Richard's privacy. The BBC has not appealed the decision, making this current law in the UK.

New Zealand has already recognised a privacy claim in *Hosking v Runting*. Given the large amount of damages awarded to Sir Richard (£210,000), we expect New Zealand plaintiffs to try to piggy-back on this ruling in cases against the media.

We expect a ruling on one such case in mid to late 2019.

Media industry developments

The media market in New Zealand is being transformed as internet-based platforms proliferate and traditional media companies seek viable business models to survive in a dynamic digital landscape.

The Court of Appeal's 2018 decision upholding the Commerce Commissions' rejection of a proposed merger between NZME and Stuff has added another layer to that challenge: protection of plurality in the media. The Commission's position, confirmed by the Court, is that plurality of media ownership and control is a public good which needs to be protected.

Both the Court and the Commission accepted that the proposed merger would have delivered quantifiable economic benefits and efficiency gains but considered that these gains were outweighed by the loss of competition.

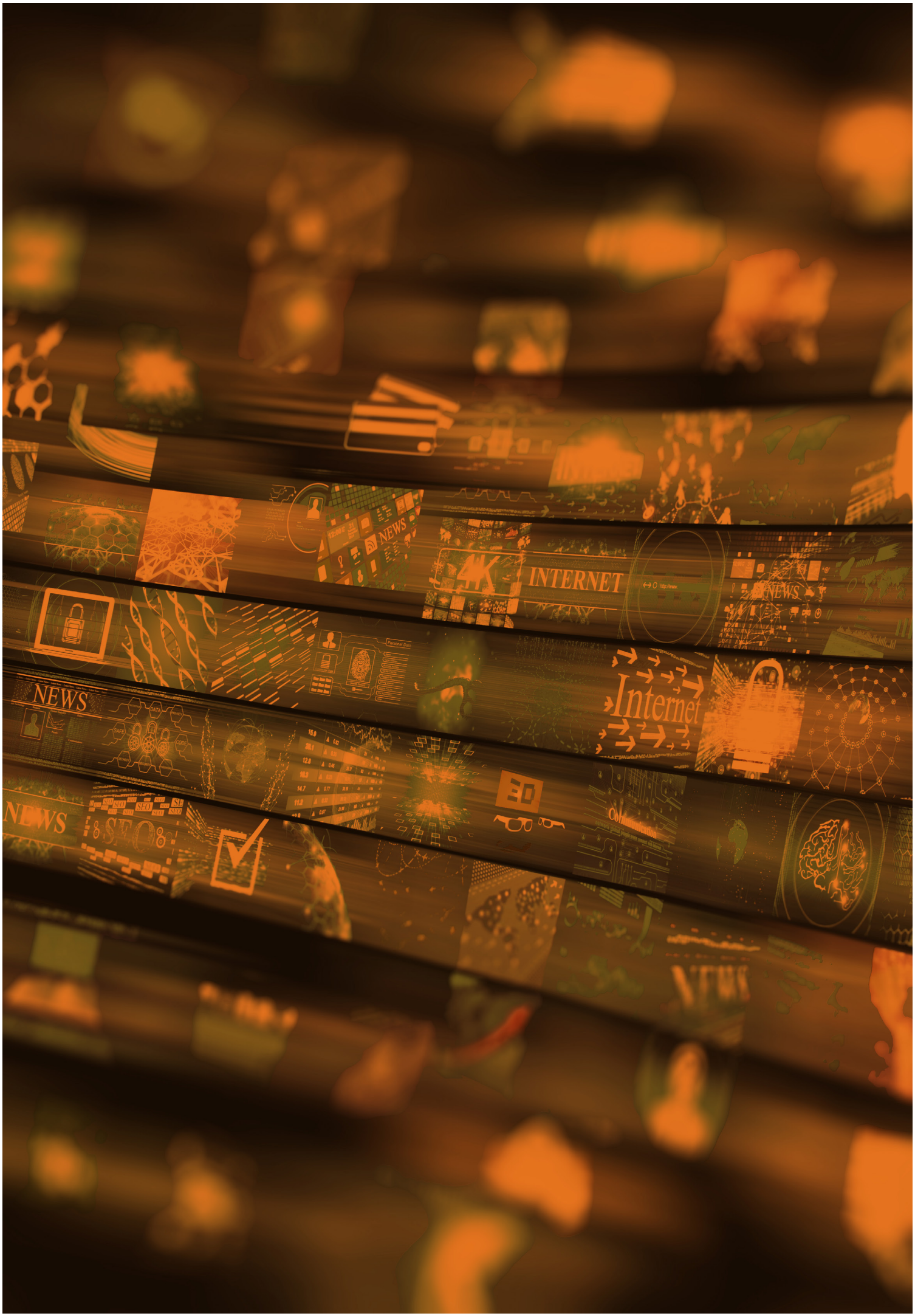
Stuff for sale

The industry eagerly awaits the official announcement from Nine Entertainment that Stuff is up for sale this March. This announcement came after Stuff's Australian parent company, Fairfax Australia, merged with Nine Entertainment in December 2018. Given the Commerce Commission's stance on media plurality, and a rapidly changing media landscape including Spark's foray into sports broadcasting, the potential bidder pool for the Stuff assets is likely to be interesting.

MediaWorks and QMS

QMS announced that it had merged its New Zealand outdoor advertising, digital media and production business with MediaWorks in late 2018.

When completed, the merger will create the largest multi-media advertising group in New Zealand. Unlike NZME-Stuff, this merger is not anti-competitive, as QMS and MediaWorks operate in different advertising markets with different audience, reach and value propositions and are already competitive. It sparks the reign of a new type of media company, and a move we are likely to see more of.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